IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

S.B.CRIMINAL MISC. PETITION NO. 372/2004
(Mewar Anchilak Gramin Bank Ltd. Vs. Roop Lal)

Date of Order : 21/07/2006

PRESENT

HON'BLE MR. JUSTICE H.R.PANWAR

Mr. Sudhir Saruparia for the petitioner.
None present for the non-petitioner though served.

BY THE COURT:-

By the instant criminal misc. petition under Section 482 Cr.P.C., the petitioner complainant has challenged the order dated 19.04.2004 passed by Additional Chief Judicial Magistrate No.2, Udaipur (for short 'the trial court' hereinafter) whereby the complaint filed by the petitioner under Section 138 of the Negotiable Instruments Act, 1881, was dismissed in default.

I have heard learned counsel for the petitioner. Carefully gone through the record of the trial court as also the order impugned.

Before the trial court, on 12.2.2004 the matter was

posted to 29.3.2004 for recording the statement of accused under Section 313 Cr.P.C. On 29.3.2004, the Presiding Officer was on leave and therefore, the matter was adjourned to 19.4.2004. On 19.4.2004, neither the complainant nor the accused non-petitioner appeared; however an application seeking dispensing with the personal appearance of the accused was moved and was accepted by the trial court.

Thus, it appears from the order-sheets of the trial court that before the trial court, the matter was for recording statement of accused under Section 313 Cr.P.C. The accused did not appear and his personal appearance was dispensed with at the request of counsel for the accused. There was no necessity for the appearance of the complainant on that day. At best, the proceeding was for recording the statement of accused which could have been recorded only when the accused appears, but the trial court instead of adjourning the matter, straightway dismissed the complaint in default. In my view, the order impugned is nothing but an abuse of the process of the Court.

In Associated Cement Co. Ltd. Vs. Keshvanand, AIR 1998 SC 596 Hon'ble Supreme Court held that two constraints are imposed on the Court for exercising the power under Section 256. First is, if the Court thinks that in a situation it is proper to

adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complaint is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the Section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.

In Mohd. Azeem Vs. A. Venkatesh and Anr. 2003 Cr.L.R. (SC) 211, wherein on the similar facts, the Apex Court held that it should have been held to be a valid ground for restoration of the complaint and the complaint was restored.

Keeping in view the decisions of Hon'ble Apex Court,

in my view, the trial court fell in error in dismissing the complaint in default of non-appearance of the complainant.

Consequently, the criminal misc. petition is allowed. The order impugned dated 19.4.2004 passed by the trial court is set aside and the complaint is restored to its original number.

(H.R.PANWAR),J.

Rp